UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ZURI OSTERHOLT, et al.,	)	Case Number: 16-cv-5089
	)	
Plaintiffs,	)	Judge Manish S. Shah
	)	
vs.	)	
	)	
COREPOWER YOGA, LLC,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND ISSUANCE OF NOTICE

TABLE OF CONTENTS

Page

I. Introduction 1

II. Allegations and Undisputed Facts... 2

A. CorePower pays wages that exceed the federal statutory minimum and vary by location, role, and individual. 2

B. To support their theory that CorePower violated the FLSA by not compensating out-of-studio work, Plaintiffs offer generic company statements about duties and the conclusory, virtually identical recitals of seven declarants..2

C. Osterholt and Benikov concede that no specific policy required them to spend hours outside the studio preparing their yoga classes or discharging other work. 4

D. Other interns and instructors did not read CorePower policies to require any substantial work outside the studio, nor do those policies require it. 6

III. Argument 8

A. Certification should be denied because Plaintiffs' motion fails in its premise and lacks even modest record support. 9

B. Certification should be denied because Plaintiffs cannot link time spent working outside the studio to any companywide requirement...14

C. "Intermediate scrutiny" is warranted by extensive discovery and confirms that individual issues predominate, precluding even conditional certification.........................20

D. Plaintiffs' proposed method and form of notice is inappropriate. 23

IV. Conclusion 25

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Adair v. Wis. Bell, Inc.,
2008 WL 4224360 (E.D. Wis. Sept. 11, 2008)....................9

Alvarez v. City of Chicago,
605 F.3d 445 (7th Cir. 2010)....................8, 20, 22

Alvirde v. Fresh Farm Int'l Market, Inc.,
2014 WL 7265072 (N.D. Ill. Dec. 19, 2014)....................8

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999)....................23

Blakes v. Ill. Bell Tel. Co.,
2013 WL 6662831 (N.D. Ill. Dec. 17, 2013)....................22, 23

Boelk v. AT&T Teleholdings, Inc,
2013 WL 261265 (W.D. Wis. Jan. 10, 2013)....................17, 18, 20

Bunyan v. Spectrum Brands, Inc.,
2008 WL 2959932 (S.D. Ill. July 31, 2008)....................20

Camilotes v. Resurrection Health Care Corp.,
286 F.R.D. 339 (N.D. Ill. 2012)....................23

Carter v. Ind. State Fair Comm'n,
2012 WL 4481350 (S.D. Ind. Jul. 17, 2012)....................13

Comcast Corp. v. Behrend,
133 S.Ct. 1426 (2013)....................20

Curless v. Great Am. Real Food Fast, Inc.,
280 F.R.D. 429 (S.D. Ill. 2012)....................24

Espenscheid v. DirectSat USA, LLC,
2011 WL 2009967 (W.D. Wis. May 23, 2011)....................22

Espenscheid v. DirectSat USA, LLC,
705 F.3d 770 (7th Cir. 2013).................... *passim*

Fields v. Bancsource, Inc.,
2015 WL 3654395 (N.D. Ill. June 10, 2015)....................24

Flores v. Lifeway Foods, Inc.,
289 F. Supp. 2d 1042 (N.D. Ill. 2003)....................8, 17

Fosbinder–Bittorf v. SSM Health Care of Wis., Inc.,
2013 U.S. Dist. LEXIS 91617 (W.D. Wis. 2013)....................25

Garza v. CTA,
2001 WL 503036 (N.D. Ill. May 8, 2001)....................19

Gomez v. PNC Bank, N.A.,
306 F.R.D. 156 (N.D. Ill. 2014)....................20

Grant v. Warner Music Grp. Corp.,
2014 WL 1918602 (S.D. N.Y. May 13, 2014)....................12

Hadley v. Journal Broad. Grp.,
2012 WL 523752 (E.D. Wis. Feb. 16, 2012)....................13, 17, 21

Hawkins v. Alorica,
287 F.R.D. 431 (S.D. Ind. 2012)....................21

Hoffmann-La Roche Inc. v. Sperling,
493 U.S. 165 (1989)....................8, 25

Holmes v. Quest Diagnostics,
2012 WL 12876965 (S.D. Fla. June 14, 2012)....................12

Howard v. Securitas Sec. Servs., USA Inc.,
2009 WL 140126 (N.D. Ill. Jan. 20, 2009)....................18, 24

Jenkins v. TJX Cos. Inc.,
853 F. Supp. 2d 317 (E.D. N.Y. 2012)....................10

Jirak v. Abbott Labs., Inc.,
566 F. Supp. 2d 845 (N.D. Ill. 2008)....................19

Jonites v. Exelon Corp.,
522 F.3d 721 (7th Cir. 2008)....................19

Miller v. ThedaCare Inc.,
2016 WL 4532124 (E.D. Wis. Aug. 29, 2016)....................12, 20

Molina v. First Line Solutions, LLC,
566 F. Supp. 2d 770 (N.D. Ill. 2007)....................8, 13

Nieddu v. Lifetime Fitness, Inc.,
977 F. Supp. 2d 686 (S.D. Tex. 2013)....................15

Pullen v. McDonald's Corp.,
2014 WL 4610296 (E.D. Mich. Sept. 15, 2014)....................19

Reed v. Cnty. of Orange,
266 F.R.D. 446 (C.D. Cal. 2010) 22

Reich v. Homier Distributing Co, Inc.,
362 F. Supp. 2d 1009 (N.D. Ind. 2005) 19

Scott v. NOW Courier, Inc.,
2012 WL 1072751 (S.D. Ind. Mar. 29, 2012)....................18, 21

Simmons v. T–Mobile USA, Inc.,
2007 WL 210008 (S.D. Tex. Jan. 24, 2007)....................21

Smallwood v. Ill. Bell Tel. Co.,
710 F. Supp. 2d 746 (N.D. Ill. 2010) 24

Steger v. Life Time Fitness, Inc.,
2016 WL 245899 (N.D. Ill. Jan. 21, 2016)....................18, 20

Thiessen v. Gen. Elec. Capital Corp.,
267 F.3d 1095 (10th Cir. 2001) 21

Threatt v. Residential CRF, Inc.,
2005 WL 4631399 (N.D. Ind. Aug. 31, 2005)....................11

Trinidad v. Pret A Manger (USA) Ltd.,
962 F. Supp. 2d 545 (S.D. N.Y. 2013)....................21

Tyson Foods, Inc. v. Bouaphakeo,
136 S.Ct. 1036 (2016)....................22

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)....................23

Williams v. Angie's List, Inc.,
—F. Supp. 2d—, 2016 WL 6996214 (S.D. Ind. Nov. 30, 2016)....................14

Witteman v. Wis. Bell, Inc.,
2010 WL 446033 (W.D. Wis. Feb. 2, 2010)....................24

Woods v. N.Y. Life Ins. Co.,
686 F.2d 578 (7th Cir. 1982) 23, 24

FEDERAL STATUTES

29 U.S.C. § 216(b) 1, 8, 21, 22

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23....................8, 20

I. INTRODUCTION

If a yoga instructor paid for two hours of studio time decides to spend additional hours preparing her class, does that violate the minimum wage requirement of the Fair Labor Standards Act? Maybe. The answer depends on a variety of factors like *why* did preparation take so long? *Who* knew about it? *How* many hours did she work over a given week, and at *what* weekly wage? Offering common answers to *none of these questions*, Plaintiffs Michele Benikov and Zuri Osterholt ask this Court to invite into a single collective action alleging minimum wage violations more than 3,700 present and former CorePower Yoga, LLC interns and instructors who worked in 18 different states, under different managers, teaching different kinds of classes, and earning widely different hourly pay. And having earned *more* than the minimum wage per studio hour, Benikov and Osterholt base their request for nationwide certification on the erroneous premise that *any* time worked outside CorePower studios violates the FLSA.

Nothing in Section 216(b) warrants this exercise in inefficiency. Just that instructor wages vary makes any determination of liability entirely individualized: earning almost $20 per studio hour, Benikov could spend *more than three extra hours preparing for each yoga class* without earning less than the statutory minimum, while Osterholt's $10 hourly pay as an intern covered 45 minutes of additional work. And requiring more individual inquiries still, Plaintiffs concede that no objective requirement, but only their individual interpretations of aspirational terms like "authenticity," "World Class Yoga Experience," and "unique classes" led them to spend significant time working outside the studio. As their deposition testimony confirms, time spent on class preparation and other duties is anything but uniform. Deciding liability alone would require an individualized analysis of hours worked and pay earned by *every* CorePower instructor in *every* CorePower location for *every* relevant week.

Even under a lenient standard, courts presented with such "hopelessly heterogeneous" classes consistently deny conditional certification. And extensive discovery warrants heightened scrutiny here. Court-approved notice is a "tool of efficient case management"; but there is nothing efficient about inviting thousands of workers into collective action only to grant an inevitable decertification. Unsupported by even "modest" evidence, Plaintiffs' motion for conditional certification should be denied.

II. ALLEGATIONS AND UNDISPUTED FACTS.

A. CorePower pays wages that exceed the federal statutory minimum and vary by location, role, and individual.

CorePower operates in over 120 locations in 18 states nationwide. (Def.'s Ex. 1, Peterson Decl. ¶ 4). Over the putative class period, CorePower has employed over 3,700 interns and instructors whose hourly wages vary widely by location and instructor. (*Id.* ¶ 5). Pegged to two hours of in-studio time per class (*i.e.*, one hour of teaching time and 30 minutes of "desk time" before and after each class), hourly wages range well above the statutory federal minimum of $7.25. (*Id.*) Even intern pay (which always meets local jurisdictional minimums) can exceed $10 per hour (or more if interns perform other roles), while instructors can exceed $40 per studio hour. (Def.'s Ex. 2, Fitzgerald Dep. Part I, 51-52, 57 (noting wage variation especially for "premium markets"); (Ex. 1 ¶ 5).[1]

B. To support their theory that CorePower violated the FLSA by not compensating out-of-studio work, Plaintiffs offer generic company statements about duties and the conclusory, virtually identical recitals of seven declarants.

[1] CorePower's Employee Handbook prohibits (but requires payment for) unauthorized work "off the clock," and also provides that instructors must immediately report any requests for "off the clock" work to the Human Resources Manager. (Def.'s Ex. 3, 19.) The Employee Handbook Instructor Addendum also provides that instructors and interns paid on an hourly basis "must keep track of all time worked." (Def.'s Ex. 4, 2.)

As evidence they are "similarly situated" to 3,700 current and former CorePower instructors and interns, named Plaintiffs Benikov and Osterholt largely rely on seven virtually-identical declarations—only five from other instructors, and all but one describing work in or around Chicago.[2] (Ex. 1 ¶ 4). The declarants recite that they performed "essential" duties "outside of the studio, such as "[d]eveloping and practicing sequences, developing class 'themes,' compiling unique music playlists" as well as "marketing" their classes and reading/writing "work-related emails." (ECF Nos. 37-(1)-(6).)

As further evidence relating to duties, Plaintiffs provide a "Job Description" for CorePower instructor positions that recites generic obligations to "[p]rovide superior yoga instruction" that adheres to "sequencing expectations, structure, and quality standards at all times"; "[m]aintain positive relationships with students"; "[c]ontinually aspire to teach a challenging, engaging and entertaining yoga class"; and comply with handbook guidelines, corporate rules, and management directives. (ECF No. 37-14.) Plaintiffs also rely on the "Guide to Rise"—a self-described "guide to delivering an inspired, CPY [student] experience" and "instructor mindsets"—that sets out aspirational goals like offering "[t]ransformational and energizing music," "[c]reat[ing] a challenging sequence . . . which honors the class style, while being innovative, fresh and true to your authentic voice"; delivering "soul-rocking theme[s] that will transform lives"; and giving "personal shares" about the impact CorePower Yoga has had on "your life." (ECF No. 37-18.) Beyond these general exhortations, Plaintiffs' evidence that putative class members performed the same "essential duties" includes newsletters with various suggestions and advice, an intern evaluation form asking whether the music fits the sequence, and the recommendation that "[i]f you ask for a sub, return the Karma and sub for someone else when you are able." (ECF No. 37-(15)-(17), (20)-(21).)

[2] Benikov, who also worked in Portland, Oregon, supplies the only variation.

Plaintiffs offer no specific evidence of wages. Instead, declarants assert that "essential" work was performed outside the yoga studio and therefore uncompensated, resulting in payment of "less than all applicable minimum wages." (ECF Nos. 37-(1)-(2), (4)-(6).)

C. Osterholt and Benikov concede that no specific policy required them to spend hours outside the studio preparing their yoga classes or discharging other work.

While working for CorePower, Benikov earned $19.25-$19.49 per studio hour as a Portland instructor, and Osterholt variously earned $8.75 and $10 per studio hour as a Chicago-area intern, and $15 per studio hour as an instructor. (Def.'s Ex. 5, Benikov Dep. 302-03; Def.'s Ex.6, Osterholt Dep. 81-82; Def.'s Ex. 7, Benikov's Employee Pay Summary Report - CPY3675; Def.'s Ex. 8, Osterholt's Employee Pay Summary Report - CPY3698). Both testified that they were nonetheless uncompensated for class preparation and other work performed outside the studio. Specifically, Benikov testified that she variously spent: two to three hours preparing (and listening to) new playlists for every class (Ex. 5 at 218-219); from two to six hours (and"[s]ometimes all day") changing and/or creating sequences for each class (*id.* 180-83); at least one hour per class researching new themes (*id.* 207-08); from three to five minutes per class preparing a personal anecdote (*id.* 213); about one hour per week reading and writing emails about "subbing" (*id.* 252-53); and from 10 to 15 minutes per week on social media as well as an extra 30 minutes per class talking to students (*id.* 245, 248-49). All totaled, Benikov claims to have prepared for up to ten hours (or more) to teach each yoga class—despite sometimes teaching three classes within 30 hours. (Ex. 5 at 227-28, 409; Def.'s Ex. 9, Benikov Class Schedule – CPY 3680)).

Unlike Benikov, Osterholt spent little or no time developing class sequences because all interns and teachers of "C1" or "Hot Power Fusion" (HPF) classes teach the same sequence of postures. (Ex. 6 at 90, 94-95, 153-56.) Osterholt nevertheless testified that preparing for each class took her, "on average," four hours as an instructor, and six hours as an intern (*id.* 173, 178). Though she could not apportion her time to particular duties, Osterholt asserted that she: created unique playlists for every class (*id.* 180); spent extensive time preparing unique class themes, as by researching an "intention and how it connects to a yog[a] philosophy," proceeding by researching a theme and "brainstorm[ing related] verbs" or creating a theme-related "word pool" (*id.* 149, 151-52); practiced before class to ensure alinement and "be more present with" students (*id.* 152); and spent two to three hours per week on CorePower email (mostly subbing requests) as an intern, and two hours as an instructor (*id.* 229). Osterholt testified that, aside from occasional social conversations with "people and friends," she did not—contrary to her declaration—"market" CorePower. (*Id.* 226.)[3]

Asked to explain these seemingly extraordinary efforts, neither Plaintiff could identify any specific CorePower rule or requirement. For example, Benikov:

- devised original sequences, playlists, and themes for each class because "[e]very single class is supposed to be unique . . . [and] a world class experience[,]" while conceding those standards required no change to any particular class element (Ex. 5 at 109, 430-31);
- attributed her time reading "subbing" requests to a "Guide to Rise" reference to karma, not any company requirement (*id.* 261); and
- testified that engaging in social media was not required (*id.* 242-43).

Osterholt similarly testified that she:

- rejected existing playlists "because that's not unique and original[,]" while conceding that simply changing voice tone or using different verbs makes a class unique (Ex. 6 at 163-64, 239);
- always developed her own themes to be "authentic[,]" while conceding that CorePower suggested themes for instructors to use (*id.* 191-92, 312-13);
- reviewed subbing emails based on a "karmic duty[,]" describing only manager emails as "required" reading (*id.* 142, 229);

[3] Osterholt seeks no compensation for time spent on social media. (Ex. 6 at 222-27.)

- refused to use some communication tools provided by CorePower because they seemed "scripted" and "phony." (*Id.* 327-29; Def.'s Ex.10, E-mail, dated Aug. 31, 2015.)

Finally, both Osterholt and Benikov testified that local managers affected how they spent time at the studio, variously:

- preventing and encouraging work on class preparation during desk time (Ex. 5 at 269-79; Ex. 6 at 116);
- allowing and disallowing instructors to leave early if the last student had gone (Ex. 5 at 162; Ex. 6 at 125); and
- intervening to prevent, or requiring instructors to accommodate, students lingering past the 30-minute window. (Ex. 5 at 162; Ex. 6 at 128-30.)

Asked what managers said about duties, Osterholt replied: "All studios are different." (Ex. 6 at 138.)

D. Other interns and instructors did not read CorePower policies to require any substantial work outside the studio, nor do those policies require it.

The declarations of other interns and instructors confirm that no specific CorePower rule or policy required them to perform substantial work outside the studio. They attest to:

- Rarely being unable to complete all duties during the one-hour of studio time per class;
- Working on playlists or other class preparations during studio time, and interacting with students for only brief times before and after class; and
- Being unaware of any requirement that instructors change playlists, themes, or personal anecdotes at any frequency or using original content.

(*See generally* Instructor Declarations[4]).

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[4] Def's Ex. 11, Danielson Decl. ¶¶ 7-8, 11-12, 15; Def's Ex. 12, Dilg Decl. ¶¶ 5-9; Def's Ex. 13,Gobins Decl. ¶¶ 6, 8-9; Def's Ex. 14, Hurdle Decl. ¶¶ 7-13; Def's Ex. 15, Hutchinson Decl. ¶¶ 6-10; Def's Ex. 16, Katsulis Decl. ¶¶ 5-9; Def's Ex. 17, Kuykendall Decl. ¶¶ 6-9; Def's Ex. 18, Johnson Decl. ¶¶ 6, 8-10; Def's Ex. 19, Max Decl. ¶¶ 6-9, 11; Def's Ex. 20, Miller Decl. ¶¶ 6-11; Def's Ex. 21, Oliver Decl. ¶¶ 6, 8, 12; Def's Ex. 22, Pancheri Decl. ¶¶ 6-8, 12; Def's Ex. 23, Paredes Decl. ¶¶ 6-8, 10; Def's Ex. 24, Rascati Decl. ¶¶ 5, 8-9, 13; Def's Ex. 25, Scannell Decl. ¶¶ 6-11, 14; Def's Ex. 26, Tabba Decl. ¶¶ 6-11; Def's Ex. 27, Taubeneck Decl. ¶¶ 6-10; Def's Ex. 28, Tkalec Decl. ¶¶ 8-11; Def's Ex. 34, Schoonhoven Decl. ¶¶ 6, 8-10; Def's Ex. 35, Jones Decl. ¶¶ 7-11.

Unlike Benikov or Osterholt, these instructors changed sequences only minimally and infrequently (if at all), used existing playlists (whether from Spotify, CorePower, other instructors, or personal collections), selected anecdotes and themes that naturally came to mind or were suggested by CorePower, and rarely reviewed subbing emails. (*See, e.g.*, Instructor Declarations.[5]) At the same time, they earned hourly wages ranging from $8.25 to $28.00, allowing from 16 minutes to 5.7 hours of work outside the studio per class consistent with the federal minimum wage. (*See* Ex. 14; ¶ 5; Ex. 27 ¶ 5.)

Materials published and distributed by CorePower (as well as Plaintiffs' own testimony) also confirm that no central policy required interns or instructors to make continuous, fundamental, or even original changes to the content of their classes. First, the sequences of poses (i.e. choreography) for "C1" and "HPF" classes (and all classes taught by interns) are fixed. (Def.'s Ex. 29, Manual at 4-1; Ex. 6 at 90, 94-95, 153-156; Ex. 5 at 44.) CorePower also provides sequences for mid-level "C2" classes, and detailed templates for choreographing upper level classes. Second, teaching materials expressly advise instructors *not* to "re-invent the wheel," but instead to tweak classes and "[k]eep it simple," (Ex. 29 at 3-1), consistent with CorePower's philosophy that rapid changes inhibits student learning, (*id.* ("[Y]ou can be creative, but don't underestimate the power of repetition")). And third, programs like the "CorePower DJ" (which provides playlists) and newsletters that suggest themes represent the culmination of longstanding instructor practices of sharing content. (*See, e.g.*, Instructor Declarations[6]). Benikov and Osterholt confirm that time spent developing themes and playlists varied by class and instructor. (Ex. 5 at 199-200; Ex 6 at 197-98, 235.)

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[5] Ex. 14 ¶ 15; 15 ¶¶ 9, 11; 16 ¶ 7; 17 ¶ 9; 18 ¶ 8; 23 ¶ 10; 26 ¶¶ 10-11; 28 ¶¶ 11-12; 35 ¶ 10.
[6] Ex. 11 ¶ 11; 13 ¶ 7; 18 ¶ 8; 20 ¶ 10; 21 ¶ 9; 23 ¶ 10; 24 ¶ 12; 35 ¶ 11.

III. ARGUMENT

The FLSA authorizes employees to bring collective actions "[on] behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). This "similarly situated" requirement means certification standards for FLSA collective actions and Rule 23(b)(3) "class actions" (seeking damages) are essentially the same. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (noting that because both Section 216 and Rule 23 are intended to promote efficiency,[7] "there isn't a good reason to have different standards for the certification of the two types of action."). Courts have nevertheless developed a two-staged certification process to accommodate the FLSA requirement that members of the collective action must "opt into the suit to be bound by the judgment." *Id.* at 771. Under the first or "conditional certification" stage, the district court exercises its wide discretion to manage collective actions by determining whether other workers should receive notice and the opportunity to join. *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010). This step generally requires plaintiffs to make "a modest factual showing . . . that they and potential class members were victims of a common policy or plan that violated the [FLSA]." *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1045 (N.D. Ill. 2003). Though a more stringent standard applies at stage two—when defendants typically move to decertify following discovery—the difference between these stages relates to the "level of proof," not whether putative collective action members must be similarly situated. *Molina v. First Line Solutions, LLC*, 566 F. Supp. 2d 770, 788 n.18 (N.D. Ill. 2007). Consistently, extensive discovery generally heightens the proof warranting certification. *See* discussion, *infra.*

[7] *See Alvirde v. Fresh Farm Int'l Market, Inc.*, 2014 WL 7265072, at *1 (N.D. Ill. Dec. 19, 2014) (*citing Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989), wherein the Supreme Court noted that "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity").

Here, Plaintiffs' motion fails under both the lenient and heightened standard of scrutiny. Two former yoga instructors ask the Court to invite over 3,700 yoga instructors and interns working across over 120 different studios in 18 states, under different managers, providing different kinds and levels of instruction, and receiving different hourly pay into a single lawsuit to challenge facially lawful compensation policies. But contrary to any claim they are similarly situated:

- Plaintiffs' theory that highly-paid interns and instructors performed "essential duties" outside the studio suggests no common violation of FLSA minimum wage requirements;
- Named Plaintiffs Benikov and Osterholt admit that "essential duties" performed outside the studio relate to their subjective interpretations of general quality standards, *not* any objective requirement across the class; and
- Extensive discovery confirms that individual issues like how much time *each* Plaintiff spent at *each* task for *each* relevant week and at *what* hourly wage predominate over the common minimum wage requirement, making conditional certification of this nationwide collective action futile at the outset.

For each of these reasons, this Court should exercise its broad discretion in administering collective actions to deny conditional certification. Notifying "a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated" would be an unwarranted waste of judicial and party resources and time. *Adair v. Wis. Bell, Inc.*, 2008 WL 4224360, at *4 (E.D. Wis. Sept. 11, 2008).

A. Certification should be denied because Plaintiffs' motion fails in its premise and lacks even modest record support.

Plaintiffs' motion for conditional certification fails in its premise. According to Plaintiffs, requiring interns and instructors to perform any work outside studio time (*i.e.*, one hour of instruction and two 30-minute periods of "front desk time") violates the minimum wage requirements of the FLSA:

> CorePower only pays its interns and instructors for time spent in class and behind the front desk. Yet, as part of their employment with CorePower, every intern

> and instructor is required to spend numerous "off-the-clock" hours developing and practicing sequences, developing class "themes," compiling unique music playlists, marketing classes, and communicating with other instructors and clients. CorePower does not pay their interns and instructors for these essential job duties.

Pl.'s Br. at 5; *see also id.* at 7 (asserting "[n]either [plaintiff was] paid for out of studio work").

But this is a minimum wage case: what matters is whether instructors and interns earned less than the minimum hourly wage for discharging their duties in any week, not whether they worked outside the studio.[8] And the record is undisputed that hourly wages for interns and instructors at CorePower ranged significantly *above* the $7.25 statutory minimum. (Ex. 1 ¶ 5.) This means Osterholt, as an Intern, could spend 45 minutes outside the studio preparing for each yoga class without dropping below FLSA requirements as an intern; and earning over $19 per studio hour as an instructor, Benikov could devote more than three full hours preparing for each class consistent with the FLSA minimum wage. (Ex. 7.) Contrary to Plaintiffs' premise, a compensation policy that pegs hourly wages to studio time, while paying interns and instructors wages variously more than the statutory minimum, suggests no violation of the FLSA. *See generally Jenkins v. TJX Cos. Inc.*, 853 F. Supp. 2d 317, 323 (E.D. N.Y. 2012) (noting evidence of a *lawful* policy does not support conditional certification) (collecting cases).

Neither do Plaintiffs support allegations of class-wide FLSA violations with even "modest" evidence. Their primary submissions—seven declarations from just five other instructors—parrot the erroneous theory that all work performed outside the studio amounts to a violation of the FLSA. Osterholt asserts, for example, that:

- "Interns and instructors were not compensated for work performed outside of the studio, such as developing and practicing sequences, developing class 'themes,' compiling unique music playlists" as well as "marketing" their classes and reading/writing work-related emails;

[8] *See* ECF No. 15, Def.'s Mem. in Support of Mot. to Dismiss at 7-8.

- "The unpaid work I performed outside of the studio was integral and essential to my employment as both an intern and instructor"; and
- "As a result, as both an intern and instructor, I was paid less than all applicable minimum wages."

(ECF No. 37-1, Osterholt Decl.) These statements do not even assert that declarants earned less than the *federal* (versus local) minimum wage.

Neither do they support any alternative basis for certification. Insofar as Plaintiffs contend that the time-consuming nature of" essential duties—rather than *where* instructors performed them—may violate the FLSA (ECF No. 37 at 3), their declarations are devoid of detail. How much time did the instructor spend developing sequences? (Osterholt testified, for example, that she taught classes choreographed by CorePower). (Ex. 6 at 28, 94, 158.) How often did she compile unique playlists? And at what hourly wage? The declarations don't say. Nor do they explain why instructors were unable to perform their duties during the 30 minutes of studio time before and after each class.[9] *See Threatt v. Residential CRF, Inc.*, 2005 WL 4631399, at *5 (N.D. Ind. Aug. 31, 2005) ("[P]laintiffs bear the burden of demonstrating a 'reasonable basis' for proceeding with a collective action, which can be shown by 'detailed allegations supported by affidavits.'").

And depressing their probative value further, Plaintiffs have offered just *seven* declarations from instructors/interns in only *two* cities to suggest "common" wage violations across the 3,700 interns and instructors paid widely divergent rates of pay in 18 states. Not just a tiny "sample," these declarations fail to suggest any basis for companywide knowledge. Yoga instructors in Chicago have no apparent basis to claim wage violations in Colorado. And claims about "regularly observ[ing] . . . co-workers performing unpaid principal, integral and essential

[9] Rather than evidence, Plaintiffs rely on allegations in their complaint to claim that duties like "checking students into class, answering questions, selling merchandise and discussing upcoming CorePower workshops" prevented other work during studio time. (ECF No. 19, Am. Compl. ¶ 6.)

duties" (*see, e.g.*, ECF Nos. 37-1 Osterholt Decl.¶ 13, 37-2 ¶ 20 Benikov Decl., 37-3 ¶ 15 Fitzgerald Decl., 37-4 ¶ 14 Carraway Decl., 37-5 ¶ 18 Morenstern Decl., 37-6 ¶18 Albert Decl., 37-7 ¶ 7 Benoit Decl.) beg the question: how would instructors complaining about work *outside the studio* observe other instructors doing the same thing?

Indeed, the "sheer expanse of the proposed class" creates "a difficult obstacle" to finding its members similarly situated. *Miller v. ThedaCare Inc.*, 2016 WL 4532124, at *7 (E.D. Wis. Aug. 29, 2016). Compounding that problem, Plaintiffs supply the kind of fill-in-the-blank declarations that courts "strongly disapprove." *Holmes v. Quest Diagnostics,* 2012 WL 12876965, at *2 (S.D. Fla. June 14, 2012) (denying conditional certification of class of phlebotomists alleging off the clock work and overtime violations). As the *Holmes* court explained:

> Such disapproval is particularly pronounced in this case because, by submitting identical Declarations for twenty three different individuals who worked in fourteen different states, the Plaintiffs have elected to cast their allegations in the most generalized terms, entirely devoid of particularity. . . . The Plaintiffs' failure in this regard is exacerbated by the fact that: they seek certification of an exceptionally large collective action on a national scale.

Id. at *2-3. Here, too, form declarations cannot possibly warrant nationwide certification.

Nor can declarations otherwise carry Plaintiffs' burden. Where policies are lawful as stated, but allegedly unlawful in practice—*i.e.*, when plaintiffs are complaining that policies dictating pay and duties somehow conflict—the value of declarations is limited. Courts generally require more than anecdotal evidence that both pay and duties are uniform across any large (especially, a nationwide) class. *See, e.g.*, *Grant v. Warner Music Grp. Corp.*, 2014 WL 1918602, at *4-5, *8 (S.D. N.Y. May 13, 2014) (granting conditional certification where official job descriptions were identical and a centralized website recited "all internships are unpaid"). No proof is possible here. Hourly pay varies materially by instructor (defeating any claim that outside-studio work is never compensated). And while Plaintiffs suggest CorePower documents establish uniform, time-consuming duties, those documents are impossibly vague. CorePower's Job Description for instructor positions, for example, contains little more than aspirational recitals—*e.g.*, that instructors must "[m]aintain positive relationships with students" or "[c]ontinually aspire to teach a challenging, engaging and entertaining yoga class." (ECF No. 37-14.) Nor can any set of uniform duties be extracted from:

- newsletters that recommend warm-up positions, ways to minimize knee injury risk from the "warrior pose," and avoiding certain "transitions" (ECF Nos. 37-(15)-(17), 37 at 16);

- a Guide to Rise (not even received by Osterholt) exhorting teachers to infuse classes with "thought provoking, action-inspiring and soul-rocking theme[s]" like (according to the complaint) breath, being present, and upper body strength (ECF Nos. 37-(18), 37 at 12);

- an intern evaluation form that asks whether "music style and volume [are] appropriate for the sequence" and a newsletter *suggesting* that instructors create "a fresh new playlist" to enhance a particular theme (ECF No. 37-(19)-(20); or

- CorePower statements that discourage excessive "subbing" of classes, suggest an simple email format for requesting "subs," and advise that "[i]f you ask for a sub, return the Karma and sub for someone else when you are able" (ECF Nos. 37-(21), 37 at 17).

Nothing about these statements suggests that up to 3,700 instructors perform *uniform* duties, let alone duties that commonly require substantial time beyond the studio. Indeed, what Plaintiffs declare possibly the most time consuming out-of-studio duty—reading subbing requests—is described not as a requirement, but the occasional obligation of a metaphysical precept. (ECF No. 37 at 17; Ex. 5 at 401).[10]

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[10] The slightly more detailed allegations in their complaint—*e.g.*, that general duties to "encourage continued class attendance" require the more specific duty market in social media (Pl.'s Br. 11), neither supply the missing uniformity nor qualify as "evidence" supporting certification. *See, e.g.*, *Hadley v. Journal Broad. Grp.*, 2012 WL 523752, at *1 (E.D. Wis. Feb. 16, 2012); *Molina*, 566 F. Supp. 2d at 786; *Carter v. Ind. State Fair Comm'n*, 2012 WL 4481350, at *1 (S.D. Ind. Jul. 17, 2012).

In sum, this request for nationwide certification is unsupported. Plaintiffs purport to offer declarants with personal knowledge that a facially unlawful policy (not compensating out-of-studio time) affects all instructors—as if bringing a small case about unpaid overtime. But the proposed class is *vast* and the purported policy—*lawful*. Aspirational recitals and conclusory declarations are not "modest evidence" that over 3,700 workers earning wide-varying wages were "together victims" of any policy that violates minimum wage requirements. More than a mere "formality," the lenient standard requires that conditional certification be denied.

B. Certification should be denied because Plaintiffs cannot link time spent working outside the studio to any companywide requirement.

Certification should also be denied because Benikov and Osterholt cannot link the time they allegedly spent working outside the studio to any companywide rule or requirement. Even at conditional certification, courts need not stick their "head[s] in the sand and ignore" evidence in the record. *Williams v. Angie's List, Inc.*, —F. Supp. 2d—, 2016 WL 6996214, at *4 (S.D. Ind. Nov. 30, 2016) (internal quotation marks and citation omitted). And here, that evidence is determinative. Begin with deposition testimony about the remarkable nature of Plaintiffs' efforts at CorePower: Plaintiffs both contend that they spent more time working *away* from the CorePower studio than inside it. To prepare each one-hour class, Benikov claims to have devoted up to six hours (or even all day) just creating new choreography, sometimes 12 hours compiling a new playlist), and an hour researching potential class "themes." (Ex. 5 at 183, 208, 227.) Osterholt testified to spending four to six hours on class preparations, even though the choreography she taught never changed. (Ex. 6 at 173, 178.) And both claimed to spend another one (Benikov) or two to three (Osterholt) hours per week addressing emails that mostly consisted of "subbing" requests from other instructors. (Ex. 5 at 252-53; Ex. 6 at 229.)

Despite this extraordinary effort—and corresponding reduction of hourly pay[11]—neither Plaintiff could link their out-of-studio time to any objective CorePower rule or requirement. To the contrary, Benikov attributed everything from her continuously changing playlists to her constant re-choreographing of sequences to general recitations in CorePower's Chicago Employee Information Packet that instructors should provide *a world class experience*. (Ex. 5 at 93-94, 112, 192, 221, 339-340; Def's Ex. 30, Employee Info. Packet, 1.) Osterholt cited the need to be *authentic* when explaining her refusal to use suggested themes and shared playlists rather than create her own. (Ex. 6 at 312-13.) And both Plaintiffs attributed their efforts to rebuild entire classes—without which out-of-studio preparation time would all but disappear—to the equally generic statement from a teaching manual that "no two classes will be *exactly* the same." (Ex. 29, 4-1; Ex. 5 at 164-66; Ex. 6 at 163-64, 284-85.) (*emphasis* added); *see also* Pl.'s Br. 11 (citing Am. Compl. ¶¶ 7-12 (referring to the "significant amount of time" required to adhere to "quality standards"). Even their hours reviewing emails admittedly arose from a sense of "karmic duty" (Ex. 6 at 142), not any requirement imposed or policed by CorePower. (Ex. 5 at 318.)[12]

Far from unifying the proposed class, these general (and karmic) objectives—at best, aspirational quality standards—splinter the "essential duties" alleged by Plaintiffs into endless variations. Consider the statement that "no two classes will be exactly the same." (Ex. 29, 4-1.) While citing this standard repeatedly, Benikov concedes that avoiding identical classes required

[11] This time also contradicted official policies requiring instructors and interns to work no longer than their scheduled shifts without written approval, and to report all overtime to a human resource manager. (Ex. 3); *see also Nieddu v. Lifetime Fitness, Inc.*, 977 F. Supp. 2d 686, 703 (S.D. Tex. 2013) (recognizing that evidence that an employer enforces appropriate pay policies weighs strongly against certification) (collecting cases).

[12] The only other substantial time components relate to social media, but Osterholt spent no substantial time on, and seeks no pay for, social media tasks, defeating any claim such "duties" were common. (Ex. 6 at 222-25.)

no change to any particular (much less every) class element. (Ex. 5 at 211.) Osterholt admits to the "lots of ways" short of re-doing everything that can make a class unique—like varying "the volume of your voice, the tone of your voice, the verbs that [you use], thinking of new and inventive ways to cue students into the postures, music is a huge factor, things like that." (Ex. 6 at 163-64.)[13] And plainly read, this "duty" can be satisfied with almost no time at all, as by:

- Varying just one class element, like the theme or the personal share—an individualized reflection on the impact of yoga that admittedly took Benikov an average of 3-5 minutes per class to prepare (Ex. 5 at 213);[14]

- Varying the sequence or playlist or other element only incrementally, as by switching out particular moves or songs; or

- Adding a playlist or quote or theme supplied by CorePower or other instructors.

The record is clear, moreover, that other interns and instructors did just that. (*See, e.g.*, Instructor Declarations[15]). Sharing playlists, for example, has been common enough to evolve into a company "DJ" program (Ex. 1 ¶ 9; *see* Ex. 6 at 238-39);[16] CorePower newsletters regularly suggest class themes; and the company has always supplied templates for advanced and fixed choreography for all introductory classes. (Def's Ex. 31, CoreConnect 10.21.15 - CPY3664; Def's Ex. 32, Hot Power Fusion Teacher Training Manual - CPY1044; Def's Ex. 33; Power Yoga Teacher Training Manual- CPY1439). And as additional declarations confirm, instructors operating under the same standards as Osterholt and Benikov also discharged

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[13] And while Benikov speculates that *not* reinventing every class would have resulted in poor evaluations, the evaluation criteria do not measure variety nor do evaluations even occur often enough to do so. (Ex. 2, 45-46.)

[14] *See, also,* Ex. 29, 4-1 ("For students who have experienced the same sequence many times, adding a theme may allow them to experience or notice something new within the familiarity of the class.").

[15] Ex. 11 ¶¶ 9-12, 15; Ex. 12 ¶¶ 8-9; Ex. 13 ¶¶ 8-9; Ex. 14 ¶¶ 10-13; Ex. 15 ¶¶ 8-10; Ex. 16 ¶ 9; Ex. 17 ¶¶ 6-9; Ex. 18 ¶¶ 8-10; Ex. 19 ¶¶ 7-9, 11; Ex. 20 ¶¶ 8-10; Ex. 21 ¶¶ 7-9; Ex. 22 ¶¶ 10-12; Ex. 23 ¶¶ 9-10, 12; Ex. 24 ¶¶ 7-9; Ex. 25 ¶¶ 9-11, 14; Ex. 26 ¶¶ 9-11; Ex. 27 ¶¶ 9-10; Ex. 28 ¶ 10-11; Ex. 34 ¶¶ 8, 10; Ex. 35 ¶¶ 9-11.

[16] Though claiming to create *hundreds* of new playlists (one for every class), Plaintiffs could only produce (for the relevant period) nine original playlists between them. (*See* Ex. 36, ¶ 3).

"essential duties" with only minimal or incremental changes from class to class. (*See* Instructor Declarations[17]). As a result, these instructors spent nowhere near the same time preparing their classes. *Id.* And even the average preparation time for Plaintiffs varied from four to six to even twelve hours per class. (Ex. 5 at 409; Ex. 6 at 173; *see also* ECF No. 19 ¶ 45.)

None of this is compatible with conditional certification. However lenient the "stage one" standard, Plaintiffs must provide evidence that potential class members "were victims of a common policy or plan that violated the [FLSA]." *Flores*, 289 F. Supp. 2d at 1045. But general standards interpreted to impose *different* requirements by *different* interns and instructors amount to the opposite: a policy whose effect on minimum wage payments cannot be determined without an entirely individualized analysis. Indeed, courts consistently deny conditional certification where wage violations depend on individual perceptions of (or responses to) company policies. In *Hadley*, for example, the court denied conditional certification of off-the-clock claims arising from a TV station's employee directive to "bring [story] ideas into the office." 2012 WL 523752, at *4. The court reasoned:

> The vagueness of the directive to generate story ideas means that would be difficult to pursue such a claim collectively because each affected employee would have interpreted and acted on the directive differently. The three Plaintiffs' own experience makes this clear, as each one spent different amounts of effort attempting to produce story ideas for one or more supervisors. . . . Assuming there was a broader company policy or plan in place, each employee's own subjective interpretation of his supervisor's directive would require an individualized, rather than common, approach.

Id. And in *Boelk v. AT&T Teleholdings, Inc.*, the court denied conditional certification of a proposed class of field technicians bringing unpaid meal period claims where the "plaintiffs' own deposition testimony proves how variable their experiences were *with respect to the way*

[17] Ex. 11 ¶¶ 9-12; Ex. 12 ¶¶ 8-9; Ex. 13 ¶¶ 7-9; Ex. 14 ¶¶ 10-13; Ex. 15 ¶¶ 8-10; Ex. 16 ¶ 9; Ex. 17 ¶¶ 9-10; Ex. 18 ¶¶ 8-10; Ex. 19 ¶¶ 7-9; Ex. 20 ¶¶ 8-10; Ex. 21 ¶¶ 7-8; Ex. 22 ¶¶ 10-12; Ex. 23 ¶¶ 9-10, 12; Ex. 24 ¶¶ 7-9; Ex. 25 ¶¶ 9-11, 14; Ex 26 ¶¶ 9-11; Ex. 27 ¶¶ 8-11; Ex. 28 ¶¶ 10-11).

performance standards affected their day-today work activities and with respect to how other factors affected their work." 2013 WL 261265, at *15 (W.D. Wis. Jan. 10, 2013) (emphasis added); *see also Scott v. NOW Courier, Inc.*, 2012 WL 1072751, at *10 (S.D. Ind. Mar. 29, 2012) (denying conditional certification in employee classification case where "[p]laintiffs' reliance on broadly general and vague terms to try to show the similarities among themselves and all the other NOW drivers undermines the success of their efforts.").[18] Here, as in all of these cases, "a highly individualized analysis" incompatible with collective proceedings would be necessary to determine whether and how often any wage violation occurred.

Nor are policy interpretations the only source of material variation. To the extent aspirational quality standards caused Plaintiffs to spend out-of-studio time preparing their classes, that time will necessarily vary by the differing skills and abilities of interns/instructors. As described by Osterholt (who devised "word pools") (Ex. 6 at 151-52), creating a yoga class is more like writing a short story than donning or doffing work gear. Preparation time would also vary by personal preference: why would instructors like Benikov, who worked for the love of yoga (Ex. 5 at 57)—or Osterholt, who loved music and constructing playlists (Ex. 6 at 239)—invest the same time on class preparation as instructors trying to maximize pay? Testimony that managers exercise discretion over instructor duties only increases variation further. (Instructor Declarations[19]); *see Howard v. Securitas Sec. Servs., USA Inc.*, 2009 WL 140126, at *6 (N.D. Ill. Jan. 20, 2009) ("[C]ourts have determined that conditional certification is inappropriate where the Plaintiff could not show that the same policies and procedures were followed at other offices or branches.").

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[18] *See also Steger v. Life Time Fitness, Inc.*, 2016 WL 245899, at *3 (N.D. Ill. Jan. 21, 2016) (denying conditional certification where pressure on personal trainers to work off the clock arose from individualized factors like department heads and each trainer's "productivity" and "personal decisions" rather than any common policy).

[19] Ex. 1 ¶ 6; *see, e.g.*, Ex. 11 ¶ 15; Ex.13 ¶ 7; Ex. 34 ¶ 12.

And these variations *matter*. For purposes of litigating the minimum wage, five minutes versus five hours spent preparing a playlist is indisputably material. Wide disparities in hours layer over broad variations in pay—indeed, just mixing Benikov's alleged wages with Osterholt's alleged hours eliminates any FLSA claim whatsoever.[20] This is not, in short, a case where employees are similarly situated *despite* differences in compensation and duties (Pl.'s Br. 8 (citing *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 848 (N.D. Ill. 2008));[21] this is a case where differing pay and duties make any putative class hopelessly heterogeneous. That significant individual fact-finding would be needed to decide liability—many plaintiffs having no conceivable claim at all—makes certification inappropriate at any stage. *See Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) (affirming dismissal of collective action by electrical workers claiming pay violations arising from on-call policies where big variations in how often workers were called made the class "hopelessly heterogeneous"); *see also Reich v. Homier Distributing Co, Inc.*, 362 F. Supp. 2d 1009, 1013-15 (N.D. Ind. 2005) (denying conditional certification where FLSA exemption turned on individual analysis of *if* and *for how long* and *how often* sales partners were responsible for loading and with what discretion); *Pullen v. McDonald's Corp.*, 2014 WL 4610296, at *1-2 (E.D. Mich. Sept. 15, 2014) (denying conditional certification of minimum wage action on behalf of about 1,000 workers alleging "off-the-clock" waiting periods based on varying pay rates and wait times).

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[20] Had Benikov (or anyone with at least Benikov's wage rate) worked the hours alleged by Osterholt in the complaint, she would have earned $192.50 per week ($19.25 x 10 hours of alleged paid time) or $33 *more* than the federally-owed minimum wage of $159.50 on 22 hours of work (*i.e.*, $7.25 x 22). (ECF No. 19 ¶¶ 45, 46.).

[21] Specifically, Plaintiffs cite *Jirak* for the proposition that they need not show identical positions or pay to be similarly situated; but *Jirak* relies on cases where common policies are unaffected by variations in specific job duties and pay. 566 F. Supp. 2d at 848-49 (citing *Garza v. CTA*, 2001 WL 503036, at *3 (N.D. Ill. May 8, 2001) ("That the plaintiffs and other potential plaintiffs may have different jobs . . . [and] earn different amounts of money . . . does not mean that they are not operating under the same policies that allegedly entitle them to overtime pay.").

C. "Intermediate scrutiny" is warranted by extensive discovery and confirms that individual issues predominate, precluding even conditional certification.

Not just unwarranted under the most lenient standard, conditional certification should be denied because "intermediate scrutiny" confirms that individual issues predominate over the common requirement that plaintiffs receive a weekly minimum wage. The "the primary purpose of the two-stage process is to allow the parties to conduct discovery on the issue whether plaintiffs are similarly situated to class members." *Boelk*, 2013 WL 261265, at *14. So when parties have taken discovery on the conditional certification question, many courts impose a higher evidentiary burden known as "intermediate" scrutiny. *See Miller*, 2016 WL 4532124, at *7 (noting courts in this circuit apply an "intermediate" or "lenient" standard "depend[ing] largely on where the case is on the spectrum of overall discovery.").[22]

With *Espenscheid*, the demands of intermediate scrutiny have sharpened. 705 F.3d at 772; *see Gomez v. PNC Bank, N.A.*, 306 F.R.D. 156, 174 (N.D. Ill. 2014), *aff'd sub nom. Bell v. PNC Bank, N.A.*, 800 F.3d 360 (7th Cir. 2015) (citing *Espenscheid* for the proposition that conditional certification requires a Rule 23-type analysis or some other form of "intermediate" scrutiny). The law is now clear that efficiency-driven provisions of Rule 23(b)(3)—including the requirement that common issues *predominate* over individual questions—apply equally to collective actions. *Espencheid*, 705 F.3d at 772; *see also Alvarez*, 605 F.3d at 449 (7th Cir. 2010) (describing similarly situated-ness in collective actions as requiring that common questions predominate). And even at conditional certification, this pragmatic requirement has teeth. Predominance is about *proof*: common evidence must resolve questions of liability and damages across the proposed class. *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1436-37 (2013). Thus, similar claims cannot make workers "similarly situated" *if only individualized evidence*

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[22] *See also Bunyan v. Spectrum Brands, Inc.*, 2008 WL 2959932, at *4 (S.D. Ill. July 31, 2008) (applying intermediate standard); *Boelk*, 2013 WL 261265, at *14 (same); *Steger*, 2016 WL 245899, at *2 (same).

can prove them. Once discovery shows liability determinations will be individualized, there is little reason—and no obvious authority—to grant even conditional certification. 29 U.S.C. § 216(b) (authorizes collective actions on behalf of *similarly situated* employees).[23] No efficiency is gained by inviting thousands of workers into collective action only to grant decertification based on evidence previously before the court. *Trinidad v. Pret A Manger (USA) Ltd*., 962 F. Supp. 2d 545, 556 (S.D. N.Y. 2013).

Nor is there reason to provide notice to thousands of dis-similarly situated Plaintiffs here. As a threshold matter, this case has proceeded well beyond pleading. CorePower has now produced 9,897 pages of documents, including official emails, training materials, newsletters, manuals and official policies, and the named Plaintiffs' evaluations. (Def's Ex. 36, Hogan Decl. ¶ 2). Plaintiffs have admittedly used social media and contact information to solicit participation from other CorePower interns and instructors—making their solitary consent (and numerous texts and email refusals) an additional reason to deny conditional certification. (Ex. 6 at 71("I've reached out to as many instructors as possible and would guess there's only a handful currently onboard – maybe 5"); Ex. 6, Osterholt_Benikov00484; ECF No. 21). *Hadley*, 2012 WL 523752, at *5 ("Regardless of the reason, a demonstrable lack of interest in a collective action is a strike against certification.").[24] And both Plaintiffs as well as an additional declarant have been deposed. Based on extent alone, this discovery warrants a heightened standard of scrutiny.

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[23] Even before *Espenscheid*, courts in this circuit have exercised their discretion to essentially "collapse the two stages of the analysis" when discovery "suggests that certification would not be appropriate" and deny certification outright. *Scott*, 2012 WL 1072751, at *7; *Hawkins v. Alorica*, 287 F.R.D. 431, 439 (S.D. Ind. 2012) (same); *see also generally Thiessen v. Gen. Elec. Capital Corp*., 267 F.3d 1095, 1105 (10th Cir. 2001) (noting broadly-recognized discretion to deny certification for trial management reasons).

[24] That only three workers (including Plaintiffs) have consented to participate in this suit itself counsels against certification generally. *See Simmons v. T–Mobile USA, Inc*., 2007 WL 210008, at *9 (S.D. Tex. Jan. 24, 2007) ("Others' interest in joining the litigation is relevant to whether or not to put a defendant employer to the expense and effort of notice to a conditionally certified class of claimants.").

Even more significantly, evidence already before the Court precludes any finding that common issues predominate. And for a simple reason: Plaintiffs are proposing representative litigation without representative evidence. As their depositions confirm, the very nature of Plaintiffs' claims makes them individualized: that Benikov spent 12 hours constructing a single playlist says nothing about time spent by other instructors or interns, let alone those who used playlists compiled by other people. Osterholt's hours researching new themes and "brainstorming [related] verbs" *across every letter of the alphabet* is no more transferrable. (Ex. 6 at 151, 195-96). And even the hourly pay of putative class members of interns and instructors indisputably varies by location, instructor, and even week. Unlike large wage actions certified by other courts—actions unified by companywide policies or representative samples—this case lacks even the possibility that common proof could show *if* and for *how long* individual plaintiffs worked without adequate compensation.[25] Indeed, determining the wages and hours of *every* instructor for *every* week would require individualized inquiries for *every* plaintiff—evidence wholly incompatible with collective litigation under Section 216(b). *See Reed v. Cnty. of Orange*, 266 F.R.D. 446, 450 (C.D. Cal. 2010) ("It is senseless to proceed as a collective action when Plaintiffs' experiences regarding missed meals vary from day to day, and from individual to individual."); *Alvarez*, 605 F.3d at 449, n. 1 (acknowledging that even in cases with "common questions as to liability, the remedy is so tailored to each particular plaintiff that a collective action is inappropriate.").[26]

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[25] *Cf. Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1048 (2016) (allowing studies calculating average donning and doffing-of-protective-gear times for workers at single pork processing plant could be used to prove classwide liability and damages in FLSA case because they would be admissible in individual actions).

[26] *See generally Espenscheid v. DirectSat USA, LLC*, 2011 WL 2009967, *5, 7 (W.D. Wis. May 23, 2011), (decertifying collective action because "proof of plaintiffs' claims depends on how individual technicians responded to the numerous policies and practices at issue in this case" and "opt-in plaintiffs [had] different work experiences and were affected by defendants' policies in different ways."); *Blakes v.*

Neither could a collective action be certified on the premise that CorePower has forfeited its right to litigate individualized defenses. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011) Even if other interns and instructors were matching the extraordinary out-of-studio efforts of Plaintiffs, CorePower would be entitled to show managers had no actual or constructive knowledge of that work; yet a collective action could not accommodate full-blown mini-trials necessary to present this and other individualized evidence. *See generally Camilotes v. Resurrection Health Care Corp.*, 286 F.R.D. 339, 353 (N.D. Ill. 2012) (decertifying class based, in part, on "negative effects that certification is very likely to have on the fairness and manageability of the proceedings."). And it remains no answer that fundamental procedural unfairness might be averted through decertification. Just the discovery demands upon certification can impose "a tremendous financial burden to the employer." *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 581 (7th Cir. 1982). Reducing conditional certification to a near-formality ignores that "grant[s] of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

This Court, in sum, should exercise its discretion to promote, not *thwart*, efficiency. No additional discovery can make this "hopelessly heterogeneous" class suitable for collective litigation. And no purpose is served by granting a futile certification request.

D. Plaintiffs' proposed method and form of notice is inappropriate.

Even if the Court grants conditional certification, it should reject the inappropriate notice method and form proposed by Plaintiffs. First, Plaintiffs do not justify notice by *both* regular U.S. mail and e-mail. Email notice raises concerns "about distortion or misleading notification

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Ill. Bell Tel. Co., 2013 WL 6662831, at *12 (N.D. Ill. Dec. 17, 2013) (decertifying where "the differences in the opt-in plaintiffs' testimony… demonstrate that it through modification of the notice itself or the addition of commentary," leading many courts to reject it. *Espenscheid*, 2010 WL 2330309, at *14 (collecting cases); *see also Fields v. Bancsource, Inc.*, 2015 WL 3654395, at *7 (N.D. Ill. June 10, 2015). Also contrary to their request for notice inside defendant's studios, Plaintiffs nowhere explain why mailing notice is insufficient. *See, e.g.*, *Howard*, 2009 WL 140126, at *9 (declining to order notice posting "absent evidence that the mailing of notices is ineffective").

Second, the reminders that Plaintiffs propose (45 days after notice and 14 days before the deadline) are not just unnecessary; they inappropriately risk being "interpreted as encouragement by the Court to join the lawsuit." *Smallwood v. Ill. Bell Tel. Co.*, 710 F. Supp. 2d 746, 753-54 (N.D. Ill. 2010) (internal quotation marks and citation omitted); *Curless v. Great Am. Real Food Fast, Inc.*, 280 F.R.D. 429, 437 (S.D. Ill. 2012) (rejecting reminder; describing third notice as perhaps "crossing into harassment").

And third, the proposed 90-day notice period would unduly delay the litigation, especially since Plaintiffs have already tried to solicit potential class members through social media and the parties have conducted significant discovery. *See Smallwood*, 710 F. Supp. 2d at 753 (finding that a 60–day notice period "provides ample opportunity for prospective class members to opt in") (citing *Witteman v. Wis. Bell, Inc.*, 2010 WL 446033, at *3 (W.D. Wis. Feb. 2, 2010) (approving a 60–day notice period)). Sixty days is both reasonable and sufficient.

Like their proposed method, the form of notice proposed by Plaintiffs is inappropriate for several reasons. As many courts have recognized, use of the court's caption creates an unwarranted appearance of "judicial sponsorship" or a "judicial imprimatur." *See Woods*, 686 F.2d at 581 (finding use of caption improper where court had not determined allegations had merit). Rather, any notice should appear on Plaintiffs' attorneys' letterhead and its disclaimer that no merits determination has been made should be conspicuously placed at the front. A neutral notice must also include essential information, including:

- An accurate description of the lawsuit and CorePower's position;
- A disclosure that joining the lawsuit may subject class member to obligations like responding to discovery, giving depositions, and/or testifying at trial. *See Espenscheid*, 2010 WL 2330309, at *11 (modifying notice to give warning about the obligations of opt-ins); and
- A disclosure that joining the lawsuit could make a class member partly responsible for Corepower's costs if CorePower prevails. *See, e.g.*, *Fosbinder–Bittorf v. SSM Health Care of Wis., Inc.*, 2013 U.S. Dist. LEXIS 91617, at *22 (W.D. Wis. Mar. 20, 2013).

As the Supreme Court explains, "[i]n exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality," avoiding even "the appearance" of a judicial endorsement of the merits. *Hoffmann-La Roche*, 493 U.S. at 174.

IV. CONCLUSION

This Court should exercise its wide discretion in administering collective actions to deny certification that amounts to an exercise in futility. At minimum, it should require Plaintiffs to modify the proposed method and form of notice to ensure the appearance of judicial neutrality.

Dated: February 28, 2017

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CERTIFICATE OF SERVICE

I certify that on February 28, 2017, I caused to be electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Andrew B. Murphy